

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

12 MARK ANTHONY STANLEY-BEY,) Case No. C 15-3742 PSG (PR)
13 Plaintiff,)
14 v.) **ORDER OF DISMISSAL**
15 JEFFREY BEARD, et al.,)
16 Defendants.)

18 On August 17, 2015, Mark Arthur Stanley-Bey, proceeding *pro se*, filed a letter which
19 initiated this action.¹ He has been granted leave to proceed *in forma pauperis* in a separate order.
20 For the reasons that follow, the court DISMISSES this action without prejudice.

21 **ANALYSIS**

22 Stanley-Bey claims that San Quentin State Prison defendants improperly treated wounds
23 that he sustained on April 8, 2015. In the complaint, Stanley-Bey states that he has not pursued
24 his claims all the way through the last level of administrative review available to him.

25 The Prison Litigation Reform Act of 1995 amended 42 U.S.C. § 1997e to provide that
26 “[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any

28¹ Stanley-Bey has consented to magistrate judge jurisdiction. (See Docket No. 8.)

1 other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until
 2 such administrative remedies as are available are exhausted.”² Compliance with the exhaustion
 3 requirement is mandatory.³ The administrative remedies need not meet federal standards, nor
 4 need they be “plain, speedy and effective.”⁴

5 Although nonexhaustion under Section 1997e(a) is an affirmative defense, a prisoner’s
 6 concession to nonexhaustion is a valid ground for dismissal.⁵ Accordingly, a claim may be
 7 dismissed without prejudice if it is clear from the record that the prisoner concedes that he did
 8 not exhaust administrative remedies.⁶ The Ninth Circuit has interpreted Section 1997e(a) to
 9 mean that an action *must* be dismissed unless the prisoner exhausted his available administrative
 10 remedies *before* he or she filed suit, even if the prisoner fully exhausts while the suit is pending.⁷

11 Here, it is obvious from the face of the complaint that Stanley-Bey did not exhaust his
 12 administrative remedies, and no exception to exhaustion is alleged or apparent in the complaint.
 13 Stanley-Bey concedes that he did not present his claims for review completely through the
 14 prison’s grievance procedure. Rather, he claims that, at the time he filed his federal complaint,
 15 he was waiting from a response from the first level of appeal. Because Stanley-Bey did not
 16 exhaust his claims prior to filing this action, this action will be dismissed without prejudice.

17 Because the lack of exhaustion is clear from the face of the complaint, the case must be
 18 dismissed without prejudice to re-filing after all administrative appeals have been exhausted.⁸
 19

20 ² 42 U.S.C. § 1997e(a).

21 ³ See *Porter v. Nussle*, 534 U.S. 516, 524 (2002); *Booth v. Churner*, 532 U.S. 731, 739-40 & n.5
 22 (2001).

23 ⁴ *Porter*, 534 U.S. at 524.

24 ⁵ See *Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 (9th Cir. 2003).

25 ⁶ See *id.*

26 ⁷ See *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir. 2002).

27 ⁸ See *id.*; *Vaden v. Summerhill*, 449 F.3d 1047, 1051 (9th Cir. 2006) (where administrative
 28 remedies are not exhausted before the prisoner sends his complaint to the court it will be

CONCLUSION

This case is DISMISSED without prejudice. The Clerk shall enter judgment and close the file.

IT IS SO ORDERED.

DATED: 11/24/2015

Paul S. Grewal
PAUL S. GREWAL
United States Magistrate Judge